84-837

Office-Supreme Court, U.S.
FILED
NOV 23 1984
ALEXANDER L. STEVAS,
CLERK

NO.

In The
Supreme Court Of The United States

OCTOBER TERM, 1984

PAUL JACOBS,
Petitioner

v.

STATE OF CONNECTICUT,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

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QUESTION PRESENTED

In affirming the petitioner's conviction for manslaughter in the first degree, did the Connecticut Supreme Court violate his right to due process of law on appeal, by arbitrarily and selectively applying a procedural rule — which has not been consistently applied — and which effectively prevented the petitioner from obtaining full appellate review of a "lesser included offense" claim that was raised and ruled upon at his trial?

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STATE OF CONNECTICUT,
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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

The petitioner, Paul Jacobs, respectfully prays that a writ of certiorari issue to review the judgments and opinion of the Supreme Court of the State of Connecticut, rendered on July 31, 1984, and September 26, 1984.

OPINIONS BELOW

The opinion of the Supreme Court of Connecticut on petitioner's direct appeal is officially reported at 194 Conn. 119. The opinion is unofficially reported at 479 A.2d 226, and is reprinted in the Appendix to this petition, at pp. 1a-11a.

The petitioner's motion to reargue was denied by the Supreme Court of Connecticut without opinion. The order of the Supreme Court of Connecticut denying petitioner's motion to reargue, dated September 26, 1984, is reprinted in the Appendix, infra, p. 20a.

JURISDICTION

The judgment of the Supreme Court of Connecticut was entered on July 31, 1984. (App. p. 1a). Petitioner's timely motion to reargue was denied by the Supreme Court of Connecticut on September 26, 1984. (App. p.20a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides in pertinent part: ". . .; nor shall any State deprive any person of life, liberty or property, without due process of law;. . ."

Section 53a-3 of the Connecticut General Statutes, entitled "Definitions," provides in pertinent part: "Except where different meanings are expressly specified, the following terms have the following meanings when used in this title:

* * *

> (13) A person acts "recklessly" with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of

such nature and degree that disregarding it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation;"

Section 53a-55 of the Connecticut General Statutes, entitled, "Manslaughter in the first degree: Class B felony.", provides in pertinent part: "(a) A person is guilty of manslaughter in the first degree when: (1) With intent to cause serious physical injury to another person, he causes the death of such person or of a third person;. . ."

Section 53a-56 of the Connecticut General Statutes, entitled "Manslaughter in the second degree: Class C. felony.", provides in pertinent part: "(a) A person is guilty of manslaughter in the second degree when: (1) He recklessly causes the death of another person;. . ."

Section 53a-59 of the Connecticut General Statutes, entitled "Assault in the first degree: Class B felony.", provides in pertinent part: "(a) A person is guilty of assault in the first degree when: (1) With intent to cause serious physical injury to another person, he causes such injury to such person or to a third person by means of a deadly weapon or a dangerous instrument; or . . . (3) under circumstances evincing an extreme indifference to human life he recklessly engages in conduct which creates a risk of death to another person, and thereby causes serious physical injury to another person."

Section 53a-60 of the Connecticut General Statutes, entitled "Assault in the second degree: Class D felony.", provides in pertinent part: "(a) A person is guilty of assault in the second degree when: (1) With intent to cause serious physical injury to another person, he causes such injury to such person or to a third person; or (2) with intent to cause physical injury to another person, he causes such injury to such person or to a third person by means of a deadly weapon or a dangerous instrument;. . ."

Section 53a-61 of the Connecticut General Statutes, entitled "Assault in the third degree: Class A misdemeanor.", provides in pertinent part: "(a) A person is guilty of assault in the third degree when: (1) With intent to cause physical injury to another person, he causes such injury to such person or to a third person; or (2) he recklessly causes serious physical injury to another person;. . ."

Section 852 of the Connecticut Practice Book, 1978, entitled "Submission for Verdict — Request for Instructions," provides as follows:

> Prior to the beginning of the arguments, sufficient copies of written requests to charge the jury must be filed with the clerk, who shall forthwith hand a copy to the judicial authority and to all other parties. Requests shall be in separate and numbered paragraphs, each containing a single proposition of law clearly and concisely stated with the citation of authority upon which it is based, and the facts supported by the evidence to which the proposition would apply. Requests to charge should not exceed fifteen in number, unless, for good cause shown, the judicial authority permits the filing of an additional number. If a request to charge is granted, the judicial authority shall apply the proposition of law to the facts of the case. A principle of law should be stated in but one request and in but one way. Requests attempting to state in different forms the same principle of law as applied to a single issue are improper. (P.B.1963, Sec. 2263.)

Section 854 of the Connecticut Practice Book, 1978, entitled "Submission for Verdict — Time for Instructions and Exceptions," provides as follows:

> The judicial authority shall deliver the instructions to the jury after the closing arguments.

> Immediately after the conclusion of the charge to the jury, counsel taking exception shall, out of the presence of the jury, state distinctly the matter objected to and the ground of the exception. The appellate court shall not be bound to consider error as to the giving of, or the failure to give, an instruction unless the matter is covered by a written request to charge or an exception has been taken immediately after the charge is delivered by the party appealing. (P.B.1963, Sec. 2265.)

STATEMENT OF THE CASE

After a trial to a state jury, petitioner Paul Jacobs was convicted of manslaughter in the first degree, in violation of Connecticut General Statutes §53a-55(a)(1). As a result of that conviction, petitioner was sentenced to a term of imprisonment of not less than four and one-half nor more than nine years.

On direct appeal, the Supreme Court of Connecticut affirmed petitioner's conviction. *State v. Jacobs,* 194 Conn. 119, 479 A.2d 226 (July 31, 1984). On September 26, 1984, the Supreme Court of Connecticut denied petitioner's motion to reargue.

In the present petition, petitioner seeks review of a single question: Whether, in affirming the petitioner's conviction for manslaughter in the first degree, the Connecticut Supreme Court violated his right to due process of law on appeal, by arbitrarily and selectively applying a procedural rule — which has not been consistently applied — and which effectively prevented the petitioner from obtaining full appellate review of a "lesser included offense" claim that was raised and ruled upon at his trial?

The factual circumstances material to a consideration of the question presented are set forth below.

A. State Trial Proceedings

The petitioner's prosecution for manslaughter arose from a shooting incident which occurred at the Good Times Restaurant in Bridgeport, Connecticut on April 11, 1980. At trial, it was undisputed that at about 12:30 a.m. on that date, the petitioner fired a single shot which struck and injured Frank Martinsky, Jr. Mr. Martinsky was taken to Park City Hospital immediately after the shooting, and he remained there for eight days. Mr. Martinsky died in the hospital on April 18, 1980.

The evidence introduced at trial was summarized by the Supreme Court of Connecticut in its opinion affirming the judgment of conviction:

> The jury could reasonably have found the following facts from the evidence introduced at trial. The defendant and a companion John Megura were drinking at the Good Times Restaurant in Bridgeport during the evening of April 10, 1980. They had been drinking at the bar for about two hours when, at about midnight, the barmaid "shut them [both] off" because "they were getting loud and [she] felt they had had enough [alcohol]." A short time later, the victim Frank Martinsky, who was playing pool in the barroom, and Megura began to exchange unfriendly words. Megura walked to the pool table where he and the victim continued their verbal argument with some physical gesturing. A short time after the argument began, the defendant walked from the bar towards the pool table, displayed a gun and indicated that he would use it if the victim hurt his friend.
>
> In response, the victim entered the restaurant's kitchen and reappeared with a butcher knife in his hand. Holding the knife in front

of him, he began to back the defendant and Megura out of the bar. The defendant, still holding the pistol, and Megura now holding a small buck knife, were backed out of the bar onto the sidewalk. They continued to argue with the victim, who stood inside the doorway of the restaurant. The defendant was standing on the sidewalk about six to eight feet from the victim when, holding his gun with two hands in a shooter's position, he fired a single shot into the victim's chest. The defendant fled the scene, but was apprehended a short time later. The victim was taken to a hospital where he died eight days later.

Officer James Walsh, one of the officers who apprehended the defendant that night, testified that after the defendant was located, he had had to be carried to the car to be transported to police headquarters. Officer Walsh testified that he brought the defendant, "conscious, but uncooperative," to the police station and turned him over to detectives Flynn and Giblin. Detective Giblin testified that he felt that the defendant was "highly intoxicated," but he could not state whether or not he smelled alcohol on the defendant's breath.

Detective Robert Biroscak, who interviewed the defendant at 9:30 on the morning of April 11, 1980, testified that the defendant was "[a]lert, and cooperative" that morning when he gave a statement. In his written statement, the defendant admitted that he had had "a couple" of drinks but that he was not intoxicated at the time of the shooting. He also admitted that he shot the victim in order "[t]o stop him from making a possible killing of John Megura."

State v. Jacobs, 194 Conn. 119, 121-122, 479 A.2d 226,

1. **Instructions To The Jury**

The petitioner was tried on an information which charged him with violating subsection (a)(1) of the first degree manslaughter statute (Conn. Gen. Stat. §53a-55). Specifically, the information alleged that petitioner, acting "with intent to cause serious physical injury to one FRANK MARTINSKY, caused [his] death. . ."

Prior to the charge to the jury, the *state* [respondent] filed a written request to charge on the offenses of assault in the first degree, Conn. Gen. Stat. §53a-59(a)(3), assault in the second degree, Conn. Gen. Stat. §53a-60(a)(1) and assault in the third degree, Conn. Gen. Stat. §53a-61(a)(1) and (2). The defense also filed a written request to charge, but it was limited to the issue of justification.

In its initial charge to the jury, the court instructed the jury on manslaughter in the first degree (Conn. Gen. Stat. §53a-55(a)(1)) as charged; and on the lesser-included offenses of assault in the first degree (Conn. Gen. Stat. §53a-59(a)(1)), and assault in the second degree (Conn. Gen. Stat. §53a-60(a)(2)).

Immediately following the charge, the *state* [respondent] took exception and orally requested that the jury also be charged on manslaughter in the second degree (Conn. Gen. Stat. §53a-56(a)(1)), defined as "recklessly caus[ing] the death of another person." In support of its request, the state argued that pursuant to either the state's or petitioner's theory of the case, the defendant's reaction to Martinsky's knife-wielding provocation, could be considered "reckless" conduct under the Connecticut statutory definition. (See Conn. Gen. Stat. §53a-3(13)). Defense counsel *joined the state in its oral request* for an instruction on second-degree manslaughter.

After a short recess, the trial court advised counsel that it would not grant their joint request:

THE COURT: Gentlemen, I have reviewed the situation. I don't think that manslaughter in the second degree is applicable here based on the facts that I have heard in this case. I have reconsidered the factual situation as pinpointed by counsel, and I don't believe that that is a situation — I have reviewed the statute again and it does not appear that that comes within the purview of the intention of the legislature with regard to that type of conduct. In this instance, the defendant is alleged to have pointed a weapon in a shooter's stance; and at that point, I think any recklessness that may be attributed to pulling the trigger is so infinitesimal as to be confusing upon the Jury and not warranted in this case. That's the reasons the Court makes in regard to the request for charge.

Both the defense and the state took exception to this ruling.

The jury subsequently returned a guilty verdict on the charge of manslaughter in the first degree.

B. State Appellate Proceedings

One of the petitioner's principal claims on direct appeal was that the trial court had erred in refusing to instruct the jury on the lesser included offense of manslaughter in the second degree. (Conn. Gen. Stat. §53a-56(a)(1)). This claim of error was briefed on appeal by both sides, and was addressed at oral argument before the Supreme Court of Connecticut. However, that Court's resolution of this issue turned solely on the question of whether an "appropriate

instruction" [for manslaughter in the second degree] had been requested. The Supreme Court of Connecticut answered that question in the negative:

> "The formulation for determining a defendant's entitlement to a lesser-included offense instruction is set forth in *State v. Whistnant*, 179 Conn. 576, 588, 427 A.2d 414 (1980). The four-part test provides that "[a] defendant is entitled to an instruction on a lesser offense if, and only if, the following conditions are met: (1) an appropriate instruction is requested by either the state or the defendant; (2) it is not possible to commit the greater offense, in the manner described in the information or bill of particulars, without having first committed the lesser; (3) there is some evidence, introduced by either the state or the defendant, or by a combination of their proofs, which justifies conviction of the lesser offense; and (4) the proof on the element or elements which differentiate the lesser offense from the offense charged is sufficiently in dispute to permit the jury consistently to find the defendant innocent of the greater offense but guilty of the lesser."
>
> The court's failure to charge on manslaughter in the second degree was justified since an "appropriate instruction" was not requested. "Prior to the beginning of the arguments, sufficient copies of written requests to charge the jury must be filed with the clerk. . . ." Practice Book § 852. Absent such a request, the refusal of the court to so charge is justified. *State v. Johnson*, 188 Conn. 515, 528, 450 A.2d 361 (1982)."
>
> *State v. Jacobs*, supra, at 127-128.

Because of the conclusion that the petitioner had not satisfied the first prong of the four-part test adopted in

State v. Whistnant, supra, the Supreme Court of Connecticut did not address the three remaining parts of the *Whistnant* test.

In a motion to reargue filed in the Supreme Court of Connecticut; see App.p.12a; the petitioner asserted, in essence, that the court's decision in the case *sub judice* was inconsistent with its decisions in previous cases where "lesser-included offense" claims had been given plenary review on appeal, despite the absence of a written request to charge filed prior to the commencement of argument (as is required by Section 852 of the Connecticut Practice Book). Petitioner maintained that prior Connecticut case law did not put defendants on notice that strict compliance with Conn. Practice Book §852 was necessary in order to satisfy the first prong of the *Whistnant* test. Therefore, by requiring strict adherence to §852 in this case — when prior case law indicated or strongly suggested that written requests to charge were not essential — the Supreme Court of Connecticut deprived the petitioner of his right to due process of law under the United States Constitution. (See App. pp.15a-17a).

The motion to reargue was denied without opinion. (See App. p.20a).

REASONS FOR GRANTING THE WRIT

In affirming the petitioner's conviction for manslaughter in the first degree, the Connecticut Supreme Court arbitrarily and selectively applied a procedural rule — which has not been regularly or strictly enforced — which effectively precluded the petitioner from obtaining appellate review of a "lesser included offense" claim that was raised at trial. By thus failing to adhere to this Court's pronouncements concerning due process at the appellate stage, the Connecticut Supreme Court has decided a federal question in a way which conflicts with applicable decisions of this Court.

The federal constitutional right that is implicated in this case is the petitioner's due process right to a meaningful and fair hearing on appeal of his state criminal conviction. Although the states are not constitutionally obligated to provide any appeals for criminal defendants; *McKane v. Durston,* 153 U.S. 684, 14 S. Ct. 913, 38 L.Ed. 867 (1894); *Ross v. Moffitt,* 417 U.S. 600, 94 S. Ct. 2437, 41 L.Ed. 2d 341 (1974); "it is perfectly obvious that where such an appeal is provided for, and the prisoner has had the benefit of it, the proceedings in the appellate tribunal are to be regarded as a part of the process of law under which he is held in custody by the state, and to be considered in determining any question of alleged deprivation of his life or liberty contrary to the 14th Amendment." *Frank v. Magnum,* 237 U.S. 309, 327, 35 S. Ct. 582, 587, 59 L.Ed. 969 (1915). See also *Cole v. Arkansas,* 333 U.S. 196, 201, 68 S. Ct. 514, 517, 92 L.Ed. 644 (1948) (where state provides for appeal to state supreme court and on that appeal considers questions raised under the federal Constitution, proceedings in state supreme court must conform to procedural due process). In this case, the petitioner was denied due process of law in his state appeal, by the Connecticut Supreme Court's unjustified — and, under the circumstances, unforseeable — reliance on a state procedural rule which prevented the petitioner from obtaining appellate review of a "lesser included offense" claim that was raised and ruled upon at petitioner's trial.

Before focusing on the merits of the petitioner's argument, two preliminary considerations require brief comment. The first is that this Court has jurisdiction to entertain the federal question presented, even though that question was first presented to the Connecticut state courts in a motion to reargue the petitioner's appeal. Here, the constitutional question arose from the "unanticipated act" of the Connecticut Supreme Court in refusing to address the merits of petitioner's appellate issue. See *Herndon v. Georgia,* 295 U.S. 441, 443-44, 55 S. Ct. 794, 795, 79 L.Ed. 1530, reh. denied, 296 U.S. 661, 56 S. Ct. 82, 80 L.Ed. 471

(1935). Consequently, the "petition for [reargument] presented the first opportunity for raising it." Id., 444.

A second consideration to be noted at the outset is that "state procedural requirements which are not strictly or regularly followed cannot deprive [the Supreme Court of the United States] of the right to review." *Barr v. City of Columbia*, 378 U.S. 146, 149, 84 S. Ct. 1734, 12 L. Ed. 2d 766 (1964). The precise claim in this case is that the Connecticut Supreme Court relied on a state procedural requirement — one that is not uniformly followed — to deprive petitioner of his right to appellate review of a trial court ruling. Thus, the procedural rule in question — whose *application* is claimed to be unconstitutional — does not constitute an adequate and independent state ground so as to bar review by this Court.

The due process violation that occurred in this case may be readily demonstrated. Section 852 of the Conn. Practice Book, 1978, provides in pertinent part that "[p]rior to the beginning of the arguments, sufficient copies of written requests to charge the jury must be filed with the clerk, who shall forthwith hand a copy to the judicial authority and to all other parties." Section 852 also provides that the requests to charge "shall be in separate and numbered paragraphs, each containing a single proposition of law clearly and concisely stated with the citation of authority upon which it is based, and the facts supported by the evidence to which the proposition would apply." It is undisputed that petitioner's trial counsel *did not* comply with this rule of court.

Section 854 of the Conn. Practice Book provides in part that "[i]mmediately after the conclusion of the charge to the jury, counsel taking exception shall, out of the presence of the jury, state distinctly the matter objected to and the ground of the exception. *The appellate court shall not be bound to consider error as to the giving of, or the failure to give, an instruction unless the matter is covered*

by a written request to charge or an exception has been taken immediately after the charge is delivered by the party appealing." (emphasis added).

In their present form, sections 852 and 854 have been part of Connecticut jurisprudence since 1976. In February of 1980, the Supreme Court of Connecticut adopted a four-part test for determining a criminal defendant's entitlement to a lesser-included offense instruction. *State v. Whistnant,* 179 Conn. 576, 588, 427 A.2d 414 (1980). Under the *Whistnant* formulation, "[a] defendant is entitled to an instruction on a lesser offense if, and only if, the following conditions are met: (1) an appropriate instruction is requested by either the state or the defendant. . ." Id., 588.

State v. Whistnant requires that "an appropriate instruction [be] requested by either the state or the defendant"; Id., 588; but the *Whistnant* decision itself says nothing about the *form* of the request (i.e., oral or written), or about its timing (i.e., prior or subsequent to the initial charge). While section 852 of the Practice Book does require the filing of written requests to charge prior to the start of the arguments, that section has not been consistently adhered to in cases involving lesser-included offense claims. Indeed, in at least two other cases involving application of the *Whistnant* formulation, the Connecticut Supreme Court has given plenary review to lesser-included offense claims *in the absence of a written request to charge.*

In *State v. Morin,* 180 Conn. 599, 430 A.2d 1297 (1980), the Connecticut Supreme Court gave full consideration to a claim that the trial court had erred in refusing to instruct the jury on first-degree burglary and first-degree robbery as lesser-included offenses of felony murder. With regard to the first prong of *Whistnant,* the *Morin* opinion states that "[t]he record shows that the state requested an instruction to the jury on burglary and robbery as lesser included crimes and that the defendant supported that request." Id., 602. The briefs submitted by the parties in

Morin make clear that the request was *oral*, not written. See Conn. Sup. Ct. Rec. & Br., A-717, Nov. Term 1979 (Part 4) (Br. of Appellant, pp. 2-3, 1a; Br. of the State, p. 9). Moreover, footnote 4 of the *Morin* opinion indicates that the parties' "request" for the lesser-included offense instruction *was not even a formal* [oral] *request:* "The parties' requests for an instruction on first degree burglary and robbery is more accurately characterized as a *mutual acknowledgement* that the allegations of the indictment supported a charge on those crimes as lesser-included offenses under *State v. Brown*, 163 Conn. 52, 61-62, 301 A.2d 547 (1972)." Id., 602 n.4 (emphasis added).

Another decision applying the *Whistnant* test — in the absence of a written request for instructions — is *State v. Gordon*, 185 Conn. 402, 422-23, 441 A.2d 119 (1981). In *Gordon*, the Connecticut Supreme Court held that "[t]he court erred when it refused the defendant's request to instruct the jury that if they did not find the defendant guilty of some degree of robbery, they could consider finding him guilty of the lesser-included offense of larceny in the fourth degree." Id., 422. The *Gordon* opinion does not identify the nature or form of the request. However, it is apparent from the briefs submitted in that case that the "request" was simply an *exception* taken after the charge was delivered. Conn. Sup. Ct. Rec. & Br. A-777, June Term 1981 (Part 2), Br. of Appellant, pp. 66-70 (claiming "the court erred in refusing, over the defendant's timely *exception*, to charge the jury with respect to the lesser-included offense of larceny in the fourth degree." (emphasis added); Br. of the State, pp. 28-29.

Morin and *Gordon* make clear one indisputable fact: that Conn. Practice Book §852 (which was in existence at the time *Morin* and *Gordon* were decided) has not generally, or uniformly, been considered an essential requirement in cases involving application of the four-part *Whistnant* test. To be sure, submission of written requests to charge prior to the beginning of arguments is preferable for many

reasons. But if an oral "mutual acknowledgement" was sufficient in *Morin*, and an oral exception sufficient in *Gordon*, then the joint oral request and exception in this case should have been deemed sufficient to satisfy the first prong of *Whistnant*. Any other conclusion would violate due process of law, since both *Morin* and *Gordon* were decided prior to the defendant's trial in 1982. Thus, any defendant or attorney reading those opinions and the briefs submitted by the parties could justifiably have concluded that strict adherence to the requirements of P.B. §852 was not necessary in order to satisfy *Whistnant's* requirement that an "appropriate instruction [be] requested by either the state or the defendant." *State v. Whistnant*, supra, 588.

The central deprivation in this case was one of *notice*. While petitioner does not contend that Conn. Practice Book §852 is itself a "novel" procedural requirement; see *Wright v. Georgia*, 373 U.S. 284, 291, 83 S. Ct. 1240, 1245 10 L.Ed. 2d 349 (1963); its application in the particular circumstances of this case was both unforseeable and unjustified given prior Connecticut law. The applicable "standards of state decisional consistency" require an examination of " 'the status of state law as of a given moment in the past — or, more exactly, the appearance to the individual of the status of state law as of that moment.***' " *Bouie v. City of Columbia*, 378 U.S. 347, 354, 84 S. Ct. 1697, 12 L.Ed. 2d 894 (1964). Here, the Connecticut Supreme Court's departure from decisional consistency "deprive[d petitioner] of due process of law 'in its primary sense of an opportunity to be heard and to defend [his] substantive right.' " Id., 354 (quoting *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 678, 50 S. Ct. 451, 453, 74 L.Ed. 1107 (1930).

Since the Connecticut Supreme Court's decision in *State v. Jacobs* is in direct and unavoidable conflict with this Court's due process pronouncements, review on certiorari is warranted.

CONCLUSION

For all of the foregoing reasons, a writ of certiorari should issue to review the judgments and opinion of the Supreme Court of Connecticut.

RESPECTFULLY SUBMITTED,

PAUL JACOBS
Petitioner

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Counsel for Petitioner

APPENDIX

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EDITOR'S NOTE

PAGES 1A thru 10A WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

Opinion of the Connecticut Supreme Court in State v. Jacobs, 194 Conn. 119, 479 A.2d 226 (1984)

STATE OF CONNECTICUT *v.* PAUL JACOBS
(11510)

SPEZIALE, C. J., PETERS, PARSKEY, SHEA and GRILLO, Js.

Convicted of the crime of manslaughter in the first degree, the defendant appealed. From the evidence presented at trial the jury could reasonably have found that he had shot the victim following an argument in a bar. The trial court had refused to allow into evidence expert medical testimony to the effect that the death of the victim was caused by grossly negligent medical treatment he received while he was being treated in a hospital after the shooting. *Held:*

1. The trial court did not err in excluding the proffered medical negligence evidence, the defendant having failed to meet his burden of establishing that the alleged gross negligence was the sole cause of the victim's death.

2. The trial court did not err in refusing to grant the defendant's oral request that the jury be instructed on the lesser included offense of manslaughter in the second degree; the rules of practice (§ 852) require that requests to charge be made in writing.
3. Because on the evidence before it the jury could not reasonably have found that the death of the victim was caused other than by the defendant's shooting him, the trial court did not err in refusing to charge the jury on various lesser included assault offenses.

Argued May 10—decision released July 31, 1984

Information charging the defendant with the crime of manslaughter in the first degree, brought to the Superior Court in the judicial district of Fairfield at Bridgeport and tried to the jury before *Melville, J.*; verdict and judgment of guilty and appeal by the defendant to this court. *No error.*

Richard Emanuel, with whom, on the brief, was *Joseph Mirsky,* for the appellant (defendant).

Robert A. Lacobelle, assistant state's attorney, with whom, on the brief, was *Donald A. Browne,* state's attorney, for the appellee (state).

GRILLO, J. The defendant Paul Jacobs was charged in a substituted information with having committed, on April 11, 1980, the crime of manslaughter in the first degree in violation of § 53a-55 (a) (1)[1] of the General Statutes. The defendant pleaded not guilty to the information and elected to be tried by a jury of six. The jury returned a verdict of guilty as charged, and the defendant was sentenced on June 30, 1982, to a term of imprisonment of not less than four and one-half nor more than nine years. The defendant has appealed from the judgment rendered on the jury's verdict.

[1] "[General Statutes] Sec. 53a 55. MANSLAUGHTER IN THE FIRST DEGREE: CLASS B FELONY. (a) A person is guilty of manslaughter in the first degree when: (1) With intent to cause serious physical injury to another person, he causes the death of such person or of a third person . . . ."

The jury could reasonably have found the following facts from the evidence introduced at trial. The defendant and a companion John Megura were drinking at the Good Times Restaurant in Bridgeport during the evening of April 10, 1980. They had been drinking at the bar for about two hours when, at about midnight, the barmaid "shut them [both] off" because "they were getting loud and [she] felt they had had enough [alcohol]." A short time later, the victim Frank Martinsky, who was playing pool in the barroom, and Megura began to exchange unfriendly words. Megura walked to the pool table where he and the victim continued their verbal argument with some physical gesturing. A short time after the argument began, the defendant walked from the bar towards the pool table, displayed a gun and indicated that he would use it if the victim hurt his friend.

In response, the victim entered the restaurant's kitchen and reappeared with a butcher knife in his hand. Holding the knife in front of him, he began to back the defendant and Megura out of the bar. The defendant, still holding the pistol, and Megura, now holding a small buck knife, were backed out of the bar onto the sidewalk. They continued to argue with the victim, who stood inside the doorway of the restaurant. The defendant was standing on the sidewalk about six to eight feet from the victim when, holding his gun with two hands in a shooter's position, he fired a single shot into the victim's chest. The defendant fled the scene, but was apprehended a short time later. The victim was taken to a hospital where he died eight days later.

Officer James Walsh, one of the officers who apprehended the defendant that night, testified that after the defendant was located, he had had to be carried to the car to be transported to police headquarters. Officer Walsh testified that he brought the defendant, "conscious, but uncooperative," to the police station and

turned him over to detectives Flynn and Giblin. Detective Giblin testified that he felt that the defendant was "highly intoxicated," but he could not state whether or not he smelled alcohol on the defendant's breath.

Detective Robert Biroscak, who interviewed the defendant at 9:30 on the morning of April 11, 1980, testified that the defendant was "[a]lert, and cooperative" that morning when he gave a statement. In his written statement, the defendant admitted that he had had "a couple" of drinks but that he was not intoxicated at the time of the shooting. He also admitted that he shot the victim in order "[t]o stop him from making a possible killing of John Megura."

On appeal, the defendant claims that the trial court erred when it (1) excluded the defendant's offer of proof on the cause of death issue, (2) refused to charge the jury on several lesser included offenses, and (3) failed to charge the jury on the defense of intoxication. We find no error.

In his first claim, the defendant maintains that the trial court erred when it excluded the proffered testimony of Eric Munoz, a physician, which would have shown that the cause of death was the grossly negligent medical treatment which the victim received while in the hospital.[2] The court refused to allow such testimony on the ground that evidence of gross negligence by treating physicians was immaterial and irrelevant unless it could be established that, as a matter of law, the mistreatment was the sole cause of death. In accord-

[2] We note that on May 13, 1982, the defendant requested and obtained a continuance during the trial so that he might present evidence as to his defense of the "gross malpractice here which resulted in the demise of the victim." The court reconvened on May 17, 1982, and at that time the defendant chose not to call his witness to the stand, but rather to make an offer of proof by way of a letter written by his expert, Munoz, which stated: "Had [the victim] been treated properly his chances of recovery could have been 80–90% (in other words at least 4 out of 5 patients with this same injury

ance with that ruling, the trial court declined to instruct the jury on the exculpatory effect of intervening negligent medical treatment. The defendant now argues that evidence of gross medical negligence which merely contributes to a victim's death is properly admissible under existing Connecticut law. Alternatively, he urges this court to overrule existing precedent and adopt a view which would allow such evidence to be introduced even if it cannot be established that the gross negligence was the sole cause of death. We disagree with the defendant's interpretation of Connecticut law. We refuse, moreover, to depart from decisional precedent.

John Klein-Robbenhaar, a doctor specializing in the field of pathology and certified by the American Board of Pathology in anatomic and clinical pathology, testified that, on April 19, 1980, he performed an autopsy on the body of Frank Martinsky. The doctor's findings as to the injuries caused by the bullet are not in dispute. He found that the bullet entered the victim's body in the left chest area, travelled through the diaphram into the left lobe of the liver, through the anterior and posterior wall of the stomach, and through the duodenum. It lacerated the left renal artery and vein and shattered the posterior aspect of the twelfth thoracic vertebra before it came to rest in the muscles of the back. Klein-Robbenhaar testified that the damage to the twelfth thoracic vertebra caused "within this particular victim, paralysis of both lower legs during his week that he was alive after the shooting"; and the injury to the renal artery, in and of itself, would have

if treated by the standard medical care in Connecticut would have survived). With the improper and negligent care he received, he died."

At best, the defendant's offer goes to show that the victim might have recovered if greater skill and care had been employed in his care and treatment. As Munoz indicated in his letter, there still would have been a 10–20 percent chance of the victim dying. This is exactly the type of conduct which does not relieve the inflictor of the wound from criminal liability. *State* v. *Tomassi*, 137 Conn. 113, 119, 75 A.2d 67 (1950); *State* v. *Bantley*, 44 Conn. 537, 540, 26 A. 486 (1877).

caused death if untreated, as would the injury to the duodenum. Although the victim underwent surgery at the hospital, his surgeon apparently failed to repair injuries to both the renal artery and the duodenum. On April 18, 1980, Frank Martinsky died. Klein-Robbenhaar testified "that the cause of death in this particular person is a combination of a number of factors. One is the blood loss which created a state of shock; and two is the peritonitis that ensued after the small bowel blew out. Peritonitis gave rise to sepsis, blood poisoning, which in turn again aggravated the state of shock and ultimately—you know, caused his vital organs to cease functioning."

It is generally recognized that where death ensues from a dangerous wound inflicted upon another, it is ordinarily no defense that unskilled or negligent medical treatment aggravated the injury. The rule was first enunciated by this court in *State* v. *Bantley*, 44 Conn. 537, 540, 26 A. 486 (1877): "If one person inflicts upon another a dangerous wound, one that is calculated to endanger and destroy life, and death ensues therefrom within a year and a day, it is sufficient proof of the offence either of manslaughter of murder as the case may be; and he is none the less responsible for the result although it may appear that the deceased might have recovered if he had taken proper care of himself, or that unskillful or improper treatment aggravated the wound and contributed to his death."

The *Bantley* rule has been repeatedly followed by this court and appears to be in accord with the majority position in other states on this issue. See *State* v. *Tomassi*, 137 Conn. 113, 75 A.2d 67 (1950); *State* v. *Leopold*, 110 Conn. 55, 147 A. 118 (1929); *State* v. *Block*, 87 Conn. 573, 89 A. 167 (1913); 100 A.L.R.2d 785–86. In *Bantley*, the victim suffered a severe gunshot wound to his arm between the shoulder and the elbow. He was treated at a hospital and died eleven days later from

lockjaw. The medical testimony differed radically as to the manner in which the wound should have been treated. The defendant requested the court to charge the jury that if they "should find that the death of [the victim] was the result or consequence of willful mismanagement or gross carelessness on the part of the attending surgeons, they could not find the accused guilty of manslaughter, as charged in the information." *State* v. *Bantley*, supra, 537. The trial court refused to instruct the jury as the defendant requested but charged "that if they should find that the accused willfully, and without justifiable cause, inflicted on [the victim] a dangerous wound, from which death would be likely to ensue, and if they should find also that his death did in fact ensue from and was caused by the wound, and not from any other cause, carelessness and mismanagement of whatever character on the part of the attending surgeons would be immaterial, and the treatment of the case by them, whatever it may have been, could not avail the accused as a defense." Id., 537–38. This court found no error on the part of the trial court in refusing to give the defendant's charge as requested or the instructions as given to the jury.

In *State* v. *Tomassi*, supra, 118, this court reiterated the *Bantley* rule and further clarified it by finding no error in that portion of the charge to the jury which stated: " '[I]t does not necessarily follow that a wound is not the cause of a death simply because there was negligence in the treatment of the wound or of the wounded man. . . . [I]t is not essential that the wound be the sole cause of death. So where a wound, either operating directly or indirectly, by causing some other condition which produces death, has been a substantial factor in causing a death, it is still to be regarded as the cause of the death even though some negligence in the treatment of the wounded man by physicians and others is also a contributing factor.' " Gross maltreat-

ment by attending physicians constitutes a defense only in the exceptional case where that maltreatment is the sole cause of the victim's death. See 100 A.L.R.2d 786 § 7; *State* v. *Tomassi*, supra, 118.

In the present case, there can be no doubt that the injuries inflicted by the gunshot contributed to the victim's death. As to the cause of death, Klein-Robbenhaar stated that the "cause of death in this particular person is a combination of a number of factors." Even if we accept that the hospital's failure to repair certain injuries to the renal artery and duodenum also contributed to the victim's death, it is clear that these injuries were caused by the bullet and would not have occurred but for the shooting incident. The wound itself contributed to the victim's death in a substantial way; see *State* v. *Tomassi*, supra, 118; and the defendant was unable to offer evidence to prove that the claimed gross negligence was the sole cause of death. Accordingly, the trial court did not err when it excluded the defendant's offer of proof on the cause of death.

The defendant also claims that the court erred in failing to instruct the jury that they might consider the defendant guilty of several lesser included offenses including manslaughter in the second degree and various assault offenses.

Prior to the charge to the jury, the state filed a written request to charge on the offenses of assault in the first degree, § 53a-59 (a) (3), assault in the second degree, § 53a-60 (a) (1) and assault in the third degree, § 53a-61 (a) (1) and (2).[3] The defense also filed a writ-

[3] General Statutes § 53a-59 states in pertinent part:

"ASSAULT IN THE FIRST DEGREE: CLASS B FELONY. (a) A person is guilty of assault in the first degree when . . . : (3) under circumstances envincing an extreme indifference to human life he recklessly engages in conduct which creates a risk of death to another person, and thereby causes serious physical injury to another person."

General Statutes § 53a-60 states in pertinent part:

"ASSAULT IN THE SECOND DEGREE: CLASS D FELONY. (a) A person is guilty

ten request to charge, but it was limited to the issue of justification. At trial, the jury was instructed on the elements of manslaughter in the first degree, § 53a-55 (a) (1), assault in the first degree, § 53a-59 (a) (1) and assault in the second degree, § 53a-60 (a) (2). Immediately following the charge, the state took exception and requested orally that the jury also be charged on manslaughter in the second degree, § 53a-56 (a) (1). Defense counsel joined in this oral request.

The formulation for determining a defendant's entitlement to a lesser-included offense instruction is set forth in *State* v. *Whistnant*, 179 Conn. 576, 588, 427 A.2d 414 (1980). The four-part test provides that "[a] defendant is entitled to an instruction on a lesser offense if, and only if, the following conditions are met: (1) an appropriate instruction is requested by either the state or the defendant; (2) it is not possible to commit the greater offense, in the manner described in the information or bill of particulars, without having first committed the lesser; (3) there is some evidence, introduced by either the state or the defendant, or by a combination of their proofs, which justifies conviction of the lesser offense; and (4) the proof on the element or elements which differentiate the lesser offense from the offense charged is sufficiently in dispute to permit the jury consistently to find the defendant innocent of the greater offense but guilty of the lesser."

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of assault in the second degree when: (1) With intent to cause serious physical injury to another person, he causes such injury to such person or to a third person . . . ."

General Statutes § 53a-61 states in pertinent part:

"ASSAULT IN THE THIRD DEGREE: CLASS A MISDEMEANOR. (a) A person is guilty of assault in the third degree when: (1) With intent to cause physical injury to another person, he causes such injury to such person or to a third person; or (2) he recklessly causes serious physical injury to another person."

We note that these statutes concern an act of a defendant which causes the "serious physical injury," rather than the death, of a victim.

The court's failure to charge on manslaughter in the second degree was justified since an "appropriate instruction" was not requested. "Prior to the beginning of the arguments, sufficient copies of written requests to charge the jury must be filed with the clerk . . . ." Practice Book § 852. Absent such a request, the refusal of the court to so charge is justified. *State* v. *Johnson,* 188 Conn. 515, 528, 450 A.2d 361 (1982).

With respect to the lesser-included assault offenses which the charge did not discuss,[4] we find that the fourth prong of the *Whistnant* test was not satisfied because there was not a sufficient dispute in the evidence concering the cause of death. Since we have concluded that the trial court properly disallowed evidence pertaining to the hospital's alleged negligence, the jury could not reasonably have found that the victim's death was not caused by the act of the defendant in shooting him.

Equally without merit is the defendant's claim that the trial court erred when it failed to instruct the jury on the defense of intoxication.[5] Since the defendant did not file a request to charge nor take an exception to

[4] The defendant maintains that the first prong of *Whistnant* was satisfied by the state's written request to charge on the various assault offenses, since *Whistnant* requires that an appropriate instruction be "requested by either the state or the defendant." *State* v. *Whistnant,* 179 Conn. 576, 588, 427 A.2d 414 (1980). For purposes of this case, we have permitted the defendant to avail himself of the state's request to charge. For future cases, however, we revise the first prong of *Whistnant* to require that a party claiming error in the failure to charge on a lesser-included offense must *himself* have filed a written request. This revision is in accordance with the general principle that a party may rely only upon his own actions in preserving a claim of error, and not upon those of his opponent.

[5] The defendant admitted firing the single shot at the victim and offered at trial evidence in support of the defense of justification (self-defense) and defense of others. It is reasonable to conclude that the defendant's failure to request a charge on intoxication was motivated by trial strategy, since the intoxication defense is inconsistent with those defenses offered by the defendant. To have proffered an intoxication charge would have substantially diluted the defendant's claim of self-defense and defense of others.

the trial court's charge, we refuse to review this claim of error. See Practice Book §§ 852 and 854; *State* v. *Gerak*, 169 Conn. 309, 316, 363 A.2d 114 (1975).

There is no error.

NO. 11510

IN THE CONNECTICUT SUPREME COURT

STATE OF CONNECTICUT	:	SUPERIOR COURT
VS:	:	JUDICIAL DISTRICT OF FAIRFIELD
PAUL JACOBS	:	AUGUST 8, 1984

MOTION TO REARGUE

Pursuant to Section 3111 et seq. of the Practice Book, the defendant-appellant in the above entitled action respectfully moves to reargue his appeal. The court's opinion in this case, *State v. Jacobs*, is found at 194 Conn. 119 (July 31, 1984).

The grounds for this request are set forth in an accompanying Practice Book §3098 statement.

PAUL JACOBS
THE DEFENDANT

BY: /s/ Richard Emanuel
RICHARD EMANUEL
His Attorney

ORDER

After having been presented to the court, the foregoing motion is hereby ORDERED: GRANTED/DENIED.

BY THE COURT

_____

CERTIFICATION:

This is to certify that copies of this motion were mailed to Attorney Joseph Mirsky, 1115 Main Street, Bridgeport, Conn., and to Robert A. Lacobelle, Office of the State's Attorney, 1061 Main Street, Bridgeport, Conn. 06604, on the 8th day of August, 1984.

/s/ Richard Emanuel
RICHARD EMANUEL

NO. 11510

IN THE CONNECTICUT SUPREME COURT

STATE OF CONNECTICUT	:	SUPERIOR COURT
VS:	:	JUDICIAL DISTRICT OF FAIRFIELD
PAUL JACOBS	:	AUGUST 8, 1984

P.B. §3098 STATEMENT

The defendant-appellant in the above entitled action has filed a motion to reargue his appeal. This P.B. §3098 Statement is submitted in support of the motion to reargue.

I. Brief History of the Case

The defendant was charged in a substituted information with having committed, on April 11, 1980, the crime of manslaughter in the first degree. The defendant pleaded not guilty to the information and elected to be tried by a jury of six. The trial, before Melville, J., commenced on May 3, 1982, and concluded on May 19, 1982, at which time the jury returned a verdict of guilty as charged. Thereafter, on June 30, 1982, the defendant was sentenced to a term of imprisonment of not less than four and one-half nor more than nine years. From the judgment, rendered on the jury's verdict, the defendant appealed.

On July 31, 1984, this Court affirmed the defendant's conviction. *State v. Jacobs,* 194 Conn. 119.

II. Specific Facts Relied Upon

The grounds for reargument are stated briefly below.

A. Failure to Instruct on Lesser-Included Offenses

This Court upheld the trial court's refusal to charge on manslaughter in the second degree (Gen. Stat. §53a-56(a)(1)) on the grounds that an " 'appropriate instruction' was not requested." *State v. Jacobs*, 194 Conn. 119, 128. The Court cited Practice Book §852, which requires that "written requests to charge the jury must be filed with the clerk" "[p]rior to the beginning of the arguments."

In this case, after the initial charge was delivered, the assistant state's attorney took exception and made an oral request that the jury also be instructed on the offense of manslaughter in the second degree (Gen. Stat. §53a-56(a)(1)) ("recklessly caus[ing] the death of another person"). (T.p.991). Defense counsel joined the state in this request. (T.pp. 992-93). Following a recess, the trial court denied the parties' joint request, and both the state and the defense took exception. (T.pp.997).

The defendant respectfully submits that this Court, in holding that an "appropriate instruction" had not been requested, took too restrictive a view of the first prong of the *Whistnant* test. *State v. Whistnant*, 179 Conn. 576, 427 A.2d 414 (1980). *Whistnant* requires that "an appropriate instruction [be] requested by either the state or the defendant"; Id., 588; but *Whistnant* says nothing about the *form* of the request (i.e., oral or written) or about its timing (i.e., prior or subsequent to the initial charge). Indeed, in at least two other cases involving application of the *Whistnant* formulation, this Court has given plenary review to "lesser-included offense" claims *in the absence of a written request.*

In *State v. Morin*, 180 Conn. 599, 430 A.2d 1297 (1980), this Court gave full consideration to a claim that the trial court erred in refusing to instruct the jury on first-degree burglary and first-degree robbery as lesser-included offenses of felony murder. With regard to the first prong of *Whistnant*, the *Morin* opinion states that "[t]he record shows that the state requested an instruction to the jury on burglary and robbery as lesser included crimes[4] and that the defendant supported that request." Id., 602. The briefs submitted by the parties in *Morin* make clear that the request was *oral*, not written. See Sup. Ct. Rec. & Br., A-717, Nov. Term 1979 (Part 4) (Br. of Appellant, pp.2-3, 1a; Br. of the State, p.9). Moreover, footnote 4 of the *Morin* opinion indicates that the parties' "request" for the lesser-included offense instruction *was not even a formal* [oral] *request:* "The parties' requests for an instruction on first degree burglary and robbery is more accurately characterized as a *mutual acknowledgement* that the allegations of the indictment supported a charge on those crimes as lesser included offenses under *State v. Brown*, 163 Conn. 52, 61-62, 301 A.2d 547 (1972)." Id., 602 n.4 (emphasis added).

Another decision applying the *Whistnant* test — in the absence of a written request for instructions — is *State v. Gordon*, 185 Conn. 402, 422-23, 441 A.2d 119 (1981). In *Gordon*, this Court held that "[t]he court erred when it refused the defendant's request to instruct the jury that if they did not find the defendant guilty of some degree of robbery, they could consider finding him guilty of the lesser included offense of larceny in the fourth degree". Id., 422. The *Gordon* opinion does not identify the nature or form of the request. However, it is apparent from the briefs submitted in that case that the "request" was simply an *exception* taken after the charge was delivered. Sup. Ct. Rec. & Br., A-777, June Term 1981 (Part 2), Br. of Appellant, pp. 66-70 (claiming "the court erred in refusing, over the defendant's timely *exception*, to charge the jury with respect to the lesser included offense of larceny in the fourth degree." (emphasis added); Br. of the State, pp. 28-29.

Morin and *Gordon* make clear one indisputable fact: that Practice Book §852 (which was in existence at the time *Morin* and *Gordon* were decided) has not generally, or uniformly, been considered an essential requirement in cases involving application of the four-part *Whistnant* test. To be sure, submission of written requests to charge prior to the beginning of arguments is preferable for many reasons. But if an oral "mutual acknowledgement" was sufficient in *Morin*, and an oral exception sufficient in *Gordon*, then the joint oral request and exception in this case must be deemed sufficient to satisfy the first prong of *Whistnant*. Any other conclusion would work a serious injustice, since both *Morin* and *Gordon* were decided prior to the defendant's trial in 1982. Consequently, any defendant or attorney reading those opinions and the briefs submitted by the parties could justifiably have concluded that strict adherence to the requirements of P.B. §852 was not necessary in order to satisfy *Whistnant*'s requirement that an "appropriate instruction [be] requested by either the state or the defendant." *State v. Whistnant*, supra, 588.

Three other factors must be briefly noted. First, if *State v. Jacobs* is intended to require *written* requests for instructions submitted prior to argument in every case where *Whistnant* is applicable, that requirement can and should be applied to all *future* defendants. But applying it to the present defendant, when prior case law indicated that *written* requests were *not* essential, would deprive the defendant of due process of law under the United States and Connecticut Constitutions.

Second, the defendant did not cite *State v. Evans*, 165 Conn. 61, 70, 327 A.2d 576 (1973) or Practice Book §3063, in seeking review of his claim of error. Indeed, there was no need to do so, since there was both an oral request and exception taken by counsel. See P.B. §854 (indicating that either a "written request to charge or an exception" to the charge will be adequate to preserve the claim of error for appellate review). To the extent that this Court held, in effect, that the defendant did not "preserve" this issue for

review by requesting an "appropriate instruction", the defendant now alternatively seeks review under *State v. Evans,* supra, and P.B. §3063. Here, "the record adequately supports a claim that a litigant has clearly been deprived of a fundamental constitutional right and a fair trial." Id., 70.

Third, to the extent that there is any ambiguity or potential conflict between P.B. §§852, 854 and the requirements of *State v. Whistnant,* that ambiguity must be resolved in the defendant's favor. See, e.g., *Bifulco v. United States,* 447 U.S. 381, 387, 100 S. Ct. 2247, 65 L.Ed.2d 205 (1980) (discussing "rule of lenity" in context of statutory construction).

Finally, with respect to the other issues raised in this appeal, reargument should be allowed because (1) with respect to the court's failure to instruct on the assault offenses, there was a sufficient dispute in the evidence concerning the cause of death, even absent the proffered medical testimony. As stated in defendant's brief, "causation of death was a fiercely contested issue — and one with which the jury was obviously struggling[16"1]; (2) with respect to the court's refusal to charge on the "defense" of intoxication, defendant submits that it is *not* reasonable to conclude that counsel's failure to request such a charge or take exception "was motivated by trial strategy." *State v. Jacobs,* supra, 128 n. 5. The *state* filed such a request, which the defendant did not oppose; but in the alternative, this claim should be reviewed under *State v. Evans,* supra and P.B. §3063 (cited at p. 37 n. 17 of defendant's brief). Moreover, "inconsistent defenses may be interposed in a criminal case." *State v. Harris,* 189 Conn. 268, 273, 455 A.2d 342 (1983); (3) with respect to the issue of the admissibility of gross medical negligence, defendant submits that *State v. Bantley,* 44 Conn. 537, 540-41 (1877) is distinguishable from the present case because in *Bantley* there was no suggestion in the record of gross medical negligence.

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[1] Footnote 16, on p. 36 of the defendant's brief, is as follows: "As evidenced by their request for reinstruction and their note (Court's Exhibit B). See Statement of Facts, supra, [pp.16-20]."

For all of the foregoing grounds, as well as the grounds set forth in the defendant's brief on appeal, the defendant respectfully requests reargument.

THE DEFENDANT

BY: /s/ Richard Emanuel
RICHARD EMANUEL
144 Golden Hill Street
P.O. Box 71
Bridgeport, Connecticut

Joseph Mirsky
1115 Main Street
Bridgeport, Connecticut

His attorneys

CERTIFICATION:

This is to certify that copies of the foregoing were mailed to Attorney Joseph Mirsky, 1115 Main Street, Bridgeport, Conn., and to Robert A. Lacobelle, Office of the State's Attorney, 1061 Main Street, Bridgeport, Conn. 06604, on the 8th day of August, 1984.

/s/ Richard Emanuel
RICHARD EMANUEL

NO. 11510

STATE OF CONNECTICUT	:	SUPREME COURT
VS:	:	STATE OF CONNECTICUT
PAUL JACOBS	:	SEPTEMBER 26, 1984

ORDER

THE MOTION OF THE DEFENDANT-APPELLANT, FILED AUGUST 9, 1984, TO REARGUE, HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY ORDERED DENIED.

BY THE COURT,

FRANCIS J. DRUMM, JR.
CHIEF CLERK

BY: /s/ Michelle T. Angeis
Assistant Clerk-Appellate

NOTICE TO:

RICHARD EMANUEL, ESQ.
DONALD A. BROWNE, S.A.
ROBERT A. LACOBELLE, A.S.A.
CLERK, SUPERIOR COURT, FAIRFIELD (27355)
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CLERK

NO. 84-837

In The

Supreme Court of the United States

OCTOBER TERM, 1984

PAUL JACOBS,

Petitioner

V.

STATE OF CONNECTICUT,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RICHARD F. JACOBSON
Assistant State's Attorney
for the Judicial District
of Fairfield

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Fairfield County Court House
1061 Main Street
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(203) 579-6506

BEST AVAILABLE COPY

QUESTION PRESENTED

Did the Connecticut Supreme Court violate due process when it held that it would not consider an oral request to charge on a lesser included offense thereby not reviewing the issue on state procedural grounds which rule was not questioned in either the state trial court or state appellate court?

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NO. 84-837

In The

Supreme Court of the United States

OCTOBER TERM, 1984

PAUL JACOBS,

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V.

STATE OF CONNECTICUT,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 34.2 of the Rules of the United States Supreme Court the Respondent is satisfied with the sections of the Petitioner's Brief designated as: Opinion Below, Jurisdiction, Constitutional and Statutory Provisions Involved, and Statement of the Case and therefore accepts their presentation.

ARGUMENT

REASONS FOR DENYING THE WRIT

The Connecticut Supreme Court in this case invoked a widely used procedural rule which requires all requests to charge be in writing to deny the Petitioner's claim that the jury should have been instructed on a lesser included offense. In the Petition for Certiorari the Petitioner for the first time seeks to attack the constitutionality of the procedural rule. *Connecticut Practice Book* § § 852 and 854. This rule parallels quite closely *Fed. R. Civ.* P. 51 and *Fed. R. Crim.* P. 30. Oral requests to charge have been disparaged in Connecticut for over seventy years. *Bogudski v. Backes*, 83 Conn. 208, 214, 76 A. 272 (1910).

The Petitioner's due process claim that the declination of the Connecticut Supreme Court to decide the issue of the applicability of a lesser included offense to the facts of the case based solely on its procedural rules was never presented to the trial court or to the appellate court. Only in a motion to reargue filed subsequent to the issuance of the appellate opinion did the Petitioner set forth the grounds upon which he now seeks this Writ. Pet. App. 12a-19A. Connecticut is a notice pleading state. Under section 3012(a) of the Connecticut Practice Book, counsel who desire to place an issue for consideration before the Connecticut Supreme Court on appeal to that tribunal must include that issue within the preliminary statement of the issues. Failure to embrace this issue within the preliminary statement of the issues will foreclose him from briefing, arguing or otherwise presenting the issue to the appellate court. *Frumento v. Mezzanette*, 192 Conn. 606, 616 n. 8, 473 A. 2d 1193 (1984); *Meyers v. Manson*, 192 Conn. 383, 398 n. 12, 472 A. 2d 759 (1984); *Verrastro v. Sivertsen*, 188 Conn. 213, 218, 448 A. 2d 1344 (1982). The Connecticut Supreme Court will relax this rule at times in an effort to hear an issue which may be plain error or in the interests of justice or which involves a constitutional issue. *State v. Ouellette*, 190 Conn. 84, 101 n. 13, 459 A. 2d 1005 (1983); *State. v. Martin*, 185 Conn. 260, 265-266 n. 9, 440 A. 2d 927 (1981).

Despite the procedural requirements enunciated by the Connecticut Rules the Petitioner admits that the issue sought to be argued before this Court was never presented to any court unitl his motion to reargue. In Connecticut this motion is decided without oral argument and without opinion. The purpose of such a motion is to afford counsel a last opportunity to convince the Connecticut Supreme Court that its opinion was erroneous. 5 *Am. Jur. 2d*, Appeal and Error, Sections 986-987; Maltbie, *Connecticut Appellate Procedure* (2d), Section 320. It has been stated that it is too late to inject a constitutional claim in a motion to reargue made to the state court. Wright, *Federal Courts* §107 (3rd ed. 1976). Nor may a rehearing motion bring up new issues. Stern, *Appellate Practice*, §9.1 (1st ed. 1981).

This court will not consider questions that were not raised at all in the state court. *Tacon v. Arizona*, 410 U.S. 351, 352 (1973). Even if an issue is properly raised in the trial court it may be waived by failure to preserve it on appeal. *Beck v. Washington*, 369 U.S. 541, 549-553 (1962); *Herndon v. Georgia*, 295 U.S. 441 (1935). Unless the issue here was presented to the Connecticut courts in such a manner that it was necessarily decided by the Connecticut Supreme Court then this Court would have no power to consider it. *Street v. New York*, 394 U.S. 580, 581-582 (1969). On the basis of the foregoing the State of Connecticut urges that the Petition for Writ of Certiorari be denied since the claimed constitutional issue was never properly presented to the state court. The Petitioner can still avail himself of a writ of habeas corpus to raise the issue. He is not foreclosed if he fails to obtain certiorari. The Connecticut Supreme Court decided the entire issue of lesser included offenses on an independent and adequate state ground. *Michigan v. Tyler*, 436 U.S. 499, 512 (1978); *Herb v. Pitcairn*, 324 U.S. 117, 125-126 (1945); *Bilby v. Stewart*, 246 U.S. 255, 257 (1918).

CONCLUSION

The Petitioner's Petition for a Writ of Certiorari should be denied since the constitutional issue it purports to raise was never presented to either the state trial court or the state's supreme court. Neither at trial or in the brief or oral argument or in the opinion of the Connecticut Supreme Court does a constitutional issue appear. It was only in a motion to reargue that the Petitioner for the first time refers to his constitutional stand. The untimeliness of this effort to transform a state procedural issue into a federal constitutional claim is apparent. The Petitioner has failed also to present a substantial federal question or to display to the Court any conflicting decisions between the various courts on the issue presented.

Respectfully submitted,

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Part A

CERTIFICATION

This is to certify that three copies of the foregoing have been mailed this date, postage prepaid, to Attorney Richard Emanuel, 144 Golden Hill Street, P.O. Box 71, Bridgeport, Connecticut 06601.

/s/ RICHARD F. JACOBSON
RICHARD F. JACOBSON

December 21, 1984.